Supreme Court, U.S.
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In The

# Supreme Court of the United States

W. M. BRELSFORD, *et al.*,

*Petitioners,*

v.

RUTTER & WILBANKS CORP., MARGARET ANN AINSWORTH, AND SHELL OIL COMPANY, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Are Objectors at a class action settlement hearing denied due process of law under the Fifth Amendment to the U.S. Constitution or the right to a meaningful certification and approval process under Rule 23 of the Federal Rules of Civil Procedure when, in accordance with Tenth Circuit precedent (on which the circuits are deeply divided), the district court employs summary judgment type procedures and so limits the hearing that Objectors are denied: (a) the right to present testimony, (b) the right to cross-examine witnesses, (c) the right to present rebuttal evidence, and (d) the right to conduct discovery, even though the hearing is conducted in connection with a pre-certification settlement and there are disputed issues of fact on the adequacy of class representation and the fairness of the settlement?

II. Did the courts below err in certifying the class and approving the settlement when the class representatives and class counsel had serious conflicts of interest that prevented adequate representation of the class; when the settlement was not fair, reasonable and adequate; when there were structural indicia of collusion in the settlement, including an unjustified premium for the named plaintiffs; and when allocation of the settlement proceeds was made among members of the class with admittedly conflicting interests without separate representation of the disparate groups, contrary to this Court's decision in *Amchem Prod. v. Windsor*?

III. Did the courts below err in approving a class action settlement that was contingent on the settlement of an individual action where the settlements were all

**QUESTIONS PRESENTED** – Continued

negotiated by the same counsel, contrary to this Court's decision in *Ortiz v. Fibreboard Corp.*?

IV. Did the courts below err in not applying heightened scrutiny to the pre-certification class action settlement in this case?

V. A reverse auction occurs where there are overlapping class actions involving the same or similar allegations in different jurisdictions with separate counsel in each case and defendants are able to exploit the competing posture of the cases by settling with the attorneys willing to accept the lowest bid. Did the Tenth Circuit legitimize collusive reverse auctions that are arising with increasing frequency in class action litigation when it ruled, mistakenly, that competing class actions could never be settled if challenges to the collusiveness of the reverse auction were allowed?

## LIST OF PARTIES

PETITIONERS – OBJECTORS:

W. M. Brelsford

Lucinda Davis

Judith Walker Funk

Peggy B. Stuart

Bruce Tefft

Charles Butler

Reed Gilmore and W.H. Gilmore, Jr., in their representative capacities as Co-Executors of the Estate of W.H. Gilmore, Sr.

Reed Gilmore and W.H. Gilmore, Jr., in their representative capacities as Co-Executors of the Estate of Dorothy R. Gilmore

Antelope Energy Co., LLC

Antelope Production Co.

William G. Kemp and Marie J. Bench, in their representative capacities as co-Trustees of the Bernard M. Bench Family Trust

RESPONDENTS – PLAINTIFFS (THE RUTTER & WILBANKS CASE):

Rutter & Wilbanks Corp.

Elliott A. Riggs

William R. Thurston, Trustee

Gordon Tanner

Walter K. Arbuckle Trust

**LIST OF PARTIES** – Continued

Eric B. Wells

Kevin C. Wells

Charles R. Wiggins

Ken Kamon

RESPONDENTS – DEFENDANTS:

Shell Oil Company

Shell Western E&P, Inc.

Mobil Oil Corporation

Mobil Producing Texas & New Mexico, Inc.

Mobil Exploration & Producing, U.S., Inc.

Exxon Mobil, Inc.

Cortez Pipeline Company, a partnership

Shell $CO_2$ Company, Ltd., a Texas limited partnership

Kinder Morgan $CO_2$ Company, a Texas limited partnership

RESPONDENTS – PLAINTIFFS (THE AINSWORTH CASE):

Margaret Ann Ainsworth

Charles M. McAfee & Company

Dorothy Gail Chappell

John Larry Clark

Nelda Lee Barlow

**LIST OF PARTIES** – Continued

Troy M. Oliver

Shorlene Oliver

Poverty Point Properties, L.P.

John H. Miller

Dee Renay

Hazel J. Neely

Ingrid Joann Hartley

Olivia Carson, LLC

Ina F. Gray

Barbara E. Glazner

John H. Glazner

Clara Cundiff

Estate of Velma Louise Henderson

Louis M. Gray

Kip E. Makeever

Edith Delight James

Laura H. Kennedy

Charles R. Wiggins

Elva Gorsuch

Ken Kamon

Jerry Chaffin

Dorothy Chaffin

**LIST OF PARTIES** – Continued

Johnnie E. Duran

Victor Duran

LeRoy Oliver

J. Ellen Oliver

Wanda Heathman

Idene Minchin

Eric B. Wells

Kevin C. Wells

Wood Oil Company

RESPONDENTS-DEFENDANTS:

(Same defendants as Rutter & Wilbanks case)

## STATEMENT PURSUANT TO RULE 29.6

Petitioner (Objector below) Antelope Energy Co., LLC states that it is a limited liability company and has no stock and no corporate parent.

Petitioner (Objector below) Antelope Production Co. is a partnership in the process of dissolving.

The other Petitioners (Objectors) are either individuals or executors of estates.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding on December 24, 2002.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 314 F.3d 1180 (10th Cir. 2002) and is reprinted in the Appendix at A-1. The district court's findings of fact and conclusions of law are not reported and are reprinted in the Appendix at A-21. The judgments and orders of the U.S. District Court for the District of Colorado are reprinted at A-50-123.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the U.S. Constitution is set forth in the Appendix at A-124.

## STATEMENT OF THE CASE

### A. The Colorado Actions.

This is an appeal from the district court's approval of a class action settlement in two related cases, Nos. 02-1220 (the *Rutter & Wilbanks* case) and 02-1221 (the *Ainsworth* case). The plaintiffs in both cases sought damages for underpayment of royalties on $CO_2$ gas pumped from wells in the McElmo Dome Unit in Colorado and transported through the Cortez Pipeline to mature oil fields in West Texas where the $CO_2$ was injected to increase oil production. Plaintiffs complained that the defendants had manipulated the price of $CO_2$ by inflating the pipeline tariff on the Cortez Pipeline and depressing the price paid for $CO_2$ in Texas, resulting in reduced royalty payments.

Plaintiffs in the Colorado actions fell into three separate groups: the small share working interest owners ("SSWIOs"), the royalty interest owners ("RIOs"), and the overriding royalty interest owners ("ORRIs"). Plaintiffs' first suit was brought as a class action in Colorado district court in October 1996, on behalf of a Coalition of SSWIOs, ORRIs and RIOs (the "Coalition lawsuit"). The district court denied motions for class certification in that case on two occasions.

In September 2000, the plaintiffs in the original Coalition lawsuit dropped the class action claims and proceeded as an individual action on behalf of the 76 members of the Coalition. The Coalition's lawyers also filed three separate class actions in Colorado district court: one on behalf of the SSWIOs ("*Watson*"); one on behalf of the RIOs ("*Ainsworth*"); and another on behalf of the ORRIs ("*Rutter*"). In February 2001, the plaintiffs in all three class actions moved for class certification, but no ruling was made on the motions.

## B. The Texas Cases.

In December 1999, after the class action had been twice denied in the Coalition lawsuit in Colorado, a group of ORRIs represented by Texas counsel filed a class action in Texas state court against the same defendants as were sued in the Coalition lawsuit (the "*Shores*" lawsuit). The lead claim in *Shores* was that the defendants were not entitled to deduct from the royalty payments *any* costs of transporting the $CO_2$ to West Texas. This claim is called the "no transportation" claim and was never asserted in any of the four Colorado lawsuits. In December 2000, the trial court certified a nationwide class action in *Shores*. In March 2001, a class action on behalf of the RIOs was filed in Texas against the same defendants (the "*Ragland*" lawsuit). *Ragland* was also certified as a nationwide class action.[1]

The defendants in the Texas cases filed interlocutory appeals of the two class certification orders. Before the court of appeals reached the merits, the defendants moved to abate those appeals pending resolution of the present appeal. The Texas appeals have been abated (but not dismissed), pending the outcome of this case.

## C. Post-Settlement Proceedings in the Colorado Actions.

In September 2001, the plaintiffs and defendants signed a settlement agreement encompassing all four of the Colorado cases and included the "no transportation"

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[1] Because the SSWIOs charged the transportation costs to the RIOs and ORRIs, Texas counsel believed that the interests of the SSWIOs were antagonistic to the interests of the RIOs and ORRIs. Therefore no Texas case was filed on behalf of the SSWIOs.

claim in the settlement. This settlement followed shortly after the Colorado Supreme Court's seminal decision in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) in which a unanimous court held that if gas is not marketable where it is removed from the ground, then the oil companies cannot deduct from their royalty payments the cost they incur in transporting the gas to market. Because there is no market for $CO_2$ at the McElmo Dome Unit, *Rogers* greatly strengthened the "no transportation" claim that was featured in the Texas cases, but had no impact on the Colorado cases where a "no transportation" claim had not been pleaded.

Upon signing the settlement agreement, plaintiffs and defendants filed a joint motion in the Colorado district court seeking preliminary approval of the settlement. Petitioners (hereafter "Objectors") had learned from defense counsel even before that motion was filed that a settlement in principle had been reached in the Colorado actions, and Objectors filed motions to intervene in the cases and motions asking the Colorado court to abstain in deference to the previously certified class actions in Texas. Both motions were denied. A-70-76 and 55-59.

Following a preliminary hearing to approve the settlement, from which Objectors were excluded, the district court, in December 2001, conditionally certified the three classes, preliminarily approved the settlement, and appointed a fairness expert. A-60-69.

Thereafter, Objectors filed detailed written objections to the proposed settlement. (R. 1614-80). Objectors sought leave to take expedited discovery and requested a status conference regarding the procedures to be used at the fairness hearing. Both requests were denied. A-70-76. At the district court's request, Objectors then filed a proposal

for the presentation of live witnesses at the fairness hearing. This too was denied. A-80, 85.

Before the final fairness hearing, the court allowed Objectors to file written proffers and affidavits, A-80, 85, but subsequently denied them the right to file rebuttal affidavits in response to affidavits filed by the fairness expert and class counsel. A-87-88. The court also prohibited Objectors from cross-examining the fairness expert and limited them to submitting written questions for the court to ask the fairness expert at the hearing, most of which were never asked. A-80, 85.

At the final fairness hearing in April 2002, the district court heard no sworn testimony (or indeed at any time throughout the entire settlement approval process). The court permitted only oral argument by counsel for plaintiffs and defendants and a presentation by the fairness expert.[2] A-125-206. The fairness expert agreed with all aspects of the proposed settlement, except that he recommended the reallocation of $1.2 million from the named plaintiffs to the class members. A-129, 178. Objectors were precluded from having any role at the settlement hearing other than allowing their counsel to speak for five minutes at the end of the hearing after the court had already announced its decision to approve the settlement. A-185-86, 186-92.

In rendering its decision, the district court certified the settlement class, approved the settlement ($50.4 million in cash and $21.4 million in alleged future relief), approved the reallocation of the settlement proceeds as

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[2] The Tenth Circuit erroneously stated that the fairness expert "testified" at the fairness hearing. A-12. The record shows that the fairness expert's statements at the hearing were not under oath. A-178-85.

recommended by the fairness expert (including a 300% premium for the class representatives and named plaintiffs), and approved $18 million in attorneys' fees for class counsel. A-194-97, 35-39, 50-54. Thereafter, the district court entered findings of fact and conclusions of law taken verbatim from proposed findings and conclusions jointly proposed by plaintiffs and defendants. A-21-49. The court then entered judgments in each of the cases which contained Rule 54(b) certifications authorizing immediate appeals. A-89-123.

Objectors appealed to the Tenth Circuit. The Tenth Circuit affirmed in all respects. This Petition followed.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Presents Issues of Great Importance to the Proper Administration of Class Actions.

This case raises important issues concerning basic procedural requirements under the due process clause and Rule 23 for the conduct of class action settlement hearings. The overwhelming number of cases filed in the federal courts are resolved through settlement. One study found that 83% of the cases in which a class was certified ended in settlement and of these 67% were certified by stipulation or for settlement purposes only. Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 709 (Chart B) (1994).

Class actions can also involve millions of people. *See, e.g., Malchman v. Davis*, 706 F.2d 426 (2nd Cir. 1983) (13 million class members). With the rights of so many litigants affected every year by class action settlements, the constitutional sufficiency of class action hearings approving such settlements is vital to the proper administration

of civil justice throughout the United States. Yet this Court has never addressed the minimum procedural requirements for such hearings. This legal uncertainty is aggravated by a split among and within the circuits on the procedural rights of objectors at class action settlement hearings (*see* discussion, Section II, *infra*), an issue not addressed in this Court's recent decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), granting objectors at such hearings the right to appeal. Accordingly, there is a pressing need for this Court to address the procedural fairness of the process by which class action settlements are approved in order to ensure that the due process rights of countless litigants are not compromised each year by settlements that are subject to constitutionally inadequate review, as occurred in this case.

This Court recognized in *Phillips Petroleum v. Shutts*, 472 U.S. 747, 812 (1985) that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class." Important as this right to "opt-out" may be, it is no substitute for and will not cure the harm of a collusive and unfair settlement because in most cases the cost of litigating the claim in an individual action is prohibitive. *See In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1136 (7th Cir. 1979) ("The letters of those subclass members who objected to the settlement proposal illustrate the illusory value of the right to pursue their claims individually."). Accordingly, the constitutional adequacy of the class action hearing at which the fairness of the settlement is judged is as important, if not more important, to absent class members than their right to "opt-out" of the settlement.

A constitutionally adequate settlement hearing is also essential to protect the right to adequate representation

guaranteed in *Shutts*. Due process requires "that the named plaintiff at all times adequately represent the interest of the absent class members." *Shutts*, 472 U.S. at 812. Without an adequate settlement hearing (particularly where there has been no prior class certification), the right to adequate representation is easily compromised. Indeed, this Court is presently considering *Dow Chemical Co. v. Stephenson*, No. 02-271, in which the finality of a class action settlement is under collateral attack for inadequate representation. That case only emphasizes the importance of a constitutionally adequate certification and settlement hearing in the first instance.

The danger of inadequate representation is particularly acute in pre-certification settlements. *See* Downs, *supra*, at 690 ("Extensive violations of Rule 23(a) and due process occurred where certification and settlement were combined. . . ."). Because this case involves a pre-certification settlement in which Objectors challenged the adequacy of representation and because the hearing afforded Objectors was so minimal, this case presents an ideal vehicle for determining what process is due objectors at a pre-certification settlement hearing under the due process clause and/or under Rule 23.

### A. The Requirements of Procedural Due Process and Rule 23.

Due process is a flexible concept that adapts procedures to the circumstances of the particular case. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). However, it is not without substance. As this Court stated in *Bell v. Burson*, 402 U.S. 535, 541-42 (1971), "[t]he hearing required by the Due Process Clause must be 'meaningful.'" Under this Court's cases, the extent to which

due process must be afforded the recipient "depends upon whether the recipient's interest in avoiding . . . loss outweighs the government's interest in summary adjudication." *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). In this case, Objectors stood to lose the right to a full trial on the merits of their claims if the settlement were approved, and since the case involved a judicial proceeding between private parties, there was no countervailing governmental interest in summary adjudication to be considered. Thus, the Tenth Circuit should have recognized that due process required an evidentiary hearing with the right to present evidence and cross-examine witnesses on relevant and disputed issues of fact.

The Tenth Circuit, however, engaged in no such reasoned analysis. Instead, it relied on its own prior decision in *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) for the conclusory proposition that "[a]n objecting shareholder is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." A-14, *infra*.

The problem with this *ipse dixit* is that it ignores decisions from this Court which strongly suggest that objectors do have a right to an evidentiary hearing before a settlement is approved if there are fact issues in dispute. In *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969), this Court stated that "[t]he right to present evidence is, of course, essential to the fair hearing required by the due process clause." In a class action case involving a hearing to approve a consent decree, this Court stated that "an intervenor is entitled to present evidence and have its objections heard." *Local No. 93, Int'l Assoc. of Firefighters AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). More recently, this Court stated that in a fairness

hearing "the settling parties must present not only their agreement, but evidence . . . *with support in findings of fact following a proceeding in which the evidence is subject to challenge.*" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999) (emphasis added).

This Court has been even more emphatic with respect to the fundamental right to cross-examine witnesses. In *Goldberg*, the Court stated in deciding that welfare recipients had a right to an evidentiary hearing before losing their benefits that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." 397 U.S. at 269. This right is important in cases involving documentary evidence, but "it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who [might have improper motives]." *Id.* at 497; *see also Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963).

Under this Court's precedents, the circumstances of this case clearly required a more "meaningful" hearing to satisfy due process than the district court allowed. To begin with, the hearing in this case involved *both* class certification and the fairness of the settlement since Objectors had specifically challenged the propriety of class certification. (R. 1614). Under these circumstances, the court had an independent duty to determine whether the requirements for class certification were met before considering the fairness of the settlement. *See Amchem Products v. Windsor*, 521 U.S. 591, 619-623 (1999); *General Motors Corp. Pickup Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 795 (3rd Cir. 1995). In making that determination, the court should have held an evidentiary hearing. *See Morrison v. Booth*, 730 F.2d 642, 643 (11th Cir.

1984) (evidentiary hearing required on class certification where issues are complex). Objectors had alleged that "Plaintiffs' counsel and the class representatives have intractable conflicts of interest such that the adequacy of representation of Rule 23(a)(4) fail." (R. 1624). These allegations raised factual issues that required a plenary hearing to resolve. *See In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 143 (5th Cir. 1985) (plenary hearing with testimonial exploration required where a factual dispute exists); *see also Manual for Complex Litigation, Third*, § 30.13, p. 216 (1995) (hearing may be necessary where "the factual basis for a class action is challenged") (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (requiring "rigorous analysis" by trial court before requirements of Rule 23(a) are met)); *cf. East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 406 (1977) (where no class has been certified, the decision whether the named plaintiffs should represent the class is appropriately made on the "full record").

### B. The Hearing in This Case.

Despite these requirements, the trial court's approval of the class action in this case was perfunctory, A-159-67, 195, and in lieu of an evidentiary hearing Objectors were allowed only to submit written proffers and affidavits as if in a summary judgment proceeding. Such limitations violated the principles of *Goldberg* where this Court held that a prohibition on a welfare recipient's right to present evidence "orally" or to "confront and cross-examine adverse witnesses" were "omissions that are fatal to the constitutional adequacy of the procedures." 397 U.S. at 268; *see also Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976) (written testimony is inadequate to satisfy due process when hearing involves an important property

right); *Calhoun v. Cook*, 487 F.2d 680, 683 (5th Cir. 1973) (intervenors afforded right "to present sworn testimony" at settlement hearing). Moreover, the district court in this case resolved factual disputes and credibility issues against Objectors without giving them the opportunity to present live witnesses. In sweeping and conclusory fashion, the district court found "that evidence presented by Plaintiffs and Defendants is *more credible* than the evidence presented by Objectors and, with respect to *conflicting factual issues*, resolves them in favor of Plaintiffs and Defendants and against Objectors." A-40-41 (emphasis added).

How the district court could make this "credibility" determination from written affidavits was never explained. *See Pence v. Kleppe*, 529 F.2d at 143 ("written documents do not allow the trier of fact to assess the demeanor and attitude of the various witnesses and thereby test their credibility"); *Autera v. Robinson*, 419 F.2d 1997, 1202 (D.C. Cir. 1969). Even if such credibility determinations could be made, however, Objectors were unable to respond effectively to the factual representations made at the fairness hearing since Objectors' affidavits had to be prepared in advance of the hearing. *Cf. Pence*, 529 F.2d at 143.

The trial court's prohibition on the right to cross-examine witnesses is even more at odds with this Court's prior decisions. The trial court repeatedly stated that it was placing great reliance on the fairness expert. A-129, 130, 194-95. Yet, it denied Objectors the right to cross-examine the fairness expert even though Objectors believed that his opinions contained numerous factual errors. Although the trial court gave Objectors an opportunity to submit suggested questions for the court to pose to the fairness expert, most of which the court never

asked, such opportunity was no substitute for the right to cross-examine so important a witness.

In *Reilly v. Pinkus*, 338 U.S. 269 (1949), this Court upheld an injunction against enforcement of an order by the Postmaster General purporting to terminate the defendant's mail privileges because at the termination hearing the defendant had been denied the right to cross-examine the government's expert witnesses. In finding the procedures employed at the hearing constitutionally deficient, this Court stated: "[I]n this kind of case as in others, one . . . must be given a reasonable opportunity to cross-examine witnesses on the vital issue [of the case]." 338 U.S. at 276; *see also Goldberg*, 397 U.S. at 269 (1970); *Jenkins,* 395 U.S. at 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."); *ICC v. Louisville and Nashville R.R. Co.*, 227 U.S. 88, 93 (1913) ("All parties . . . must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."). There is also strong support among the lower courts for the Objectors' right to cross-examine witnesses at a derivative suit or class action settlement hearing. *See GM Engine Interchange Litig.*, 594 F.2d at 1123 and n.19; *Girsh v. Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833 (3rd Cir. 1973); *Wolf v. Nazareth Enterprises, Inc.*, 303 F.2d 152, 154-55 (2nd Cir. 1962); *Cohen v. Young*, 127 F.2d 721, 724 (6th Cir. 1942).

Had Objectors been given the opportunity to cross-examine the fairness expert, they might have been able to demonstrate that his opinions were flawed and either changed those opinions or discredited them. For example, Objectors wanted to cross-examine the conclusion in his

affidavit that "there is a very real risk that all of Plaintiffs' claims could be barred by limitations" (R. 3799), and his opinion that, in securing a commitment from Cortez in the settlement to reduce the debt on the Cortez pipeline, plaintiffs created a present benefit which, together with other less important factors, yielded $22.5 million in lower future tariffs. (R. 3808). On the statute of limitations issue, there was a factual dispute over whether, and to what extent, any discount in the value of the class claims was warranted. On the debt reduction issue, there was a factual dispute over whether debt reduction was already part of the business plan of the Cortez pipeline and therefore if that commitment had any value at all. There were also serious problems with the expert's proposed allocation of the settlement proceeds and the award of attorney fees. (R. 3805-10). Objectors were denied the right to cross-examine the fairness expert on all these issues. Given the great weight assigned by the district court to the fairness expert's opinions, this was a denial of the right to cross-examination on "vital issues" in the case. *Reilly*, 338 U.S. at 276.

The right to offer rebuttal evidence is also an important due process right. *ICC*, 227 U.S. at 93. The district court refused to allow Objectors to "file affidavits and/or proffers by persons who previously have filed similar papers with the Court." A-87-88. The Tenth Circuit held that this refusal was "no additional due process violation." A-15.

In fact, this was a denial of due process because it effectively denied Objectors any opportunity to rebut the statements made by proponents of the settlement at the settlement hearing and in their last set of affidavits. Objectors' economist, Dr. Tysseling, had previously filed affidavits on the fairness of the settlement; and Mr. Figa,

an attorney, had previously filed an affidavit on the adequacy of representation and fairness issues. (R. 2280, 2663 and 2312). Accordingly, both experts were disqualified as rebuttal witnesses. Because Objectors had no other experts, this ruling left Objectors with no witnesses to rebut the most critical issues in the case.

Finally the district court's refusal to allow even minimal discovery into the conduct of settlement negotiations or to allow examination of witnesses on that subject at the settlement hearing itself compromised all of Objectors' other rights. This Court has not directly addressed the right to discovery as an element of due process. However, several courts of appeals have concluded (although not on due process grounds) that discovery into the conduct of settlement negotiations is critical to a proper evaluation of the fairness of the settlement and the adequacy of representation under Rule 23. *See GM Engine Interchange Litig.*, 594 F.2d at 1123-26 and nn.19 and 20 ("We think . . . the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion."); *see also Girsh*, 521 F.2d at 157; *Saylor v. Lindsey*, 456 F.2d 896, 904; *cf. Amchem*, 521 U.S. at 621 ("the court would face a bargain proffered for its approval *without benefit of adversarial investigation*.") (emphasis added).

In its findings of fact, the district court concluded that "Objectors have not submitted any evidence of collusion," A-41, and the Tenth Circuit agreed. A-19. Given the trial court's prohibition on investigation into the conduct of the settlement negotiations, these rulings constituted a "Catch 22" for Objectors because they denied Objectors' claims of collusion on grounds of insufficient evidence while at the same time denying Objectors the means for discovering such evidence. *See Doninger v. Pacific Northwest Bell*, 564

F.2d 1304, 1313 (9th Cir. 1977) ("[T]he necessary antecedent to the presentation of evidence is, in most cases, enough discovery to obtain the material, especially when the information is within the sole possession of the defendant."); *see also* G. Donald Puckett, *Peering Into A Black Box: Discovery and Adequate Attorney Representation in Class Action Settlements*, 77 Tex. L. Rev. 1271, 1300 (1999) ("A right without access to the facts necessary for asserting the right is no right at all."). Often the best and sometimes the only direct evidence of collusion is to be found in the conduct of the settlement negotiations themselves. Moreover, the district court's assertion that Objectors "had access to significant discovery in this matter and the Texas case," A-80, reaffirmed by the Tenth Circuit, A-11, misses the mark. The discovery to which the Objectors had access was discovery on the merits; what they sought and were denied was discovery into the conduct of the settlement negotiations.

This is not, of course, to say that an inquiry into settlement negotiations is automatically required every time a class action is settled. If the objections are frivolous, no evidentiary hearing is required. *See Mandujano v. Basic Vegetable Products*, 541 F.2d 832, 836 (9th Cir. 1976). But that is not this case.

### C. The Objections Were Factually Specific and Substantial.

Objectors made serious allegations of conflicts of interest in the representation of the class supported by affidavits that should have required specific factual inquiry and resolution. Indeed, many of these allegations were grounded in the structure of the settlement itself. They include:

(1) An award to each of the class representatives that was more than 300% greater than the recovery by the absent class members. At least four courts of appeals have held that "[W]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *accord Staton v. Boeing Co.*, 313 F.3d 447, 484-85 (9th Cir. 2002); *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000); *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2nd Cir. 1982). The Eleventh Circuit in *Holmes* characterized a preference for named plaintiffs in the settlement as "facial unfairness," 706 F.2d at 1148, and placed a substantial burden on proponents of the settlement to overcome the facial unfairness of such an allocation. *Id.* Yet the Tenth Circuit did not even address this "facial unfairness" issue in its opinion, even though it was raised in both the trial court and on appeal. (R. 1635-37) (App. Br. at 50-52). Moreover, Objectors were denied the opportunity to examine class counsel about the justification for such preferences and none was offered at the fairness hearing. A-125-206.

(2) The settlement was negotiated by counsel whose case had been denied class action status on two prior occasions. At least three courts of appeals have held that settlements negotiated at the pre-certification stage require heightened scrutiny because an attorney who has not been approved as class counsel necessarily negotiates from a position of weakness. *See General Motors Interchange*, 594 F.2d at 1125 (7th Cir. 1979); *accord GM Truck*, 55 F.3d at 805 (3rd Cir. 1995); *Malchman*, 706 F.2d at 434 (2nd Cir. 1983). This was especially true here because the case was not only at the pre-certification stage, it had been

denied class certification. Thus, unlike other pre-certification cases where counsel can still make a credible threat to seek class certification at a future date, here the negotiating posture of class counsel could not have been weaker. *Cf. Amchem*, 521 U.S. at 621 (1997) ("Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer. . . ."). The trial court found that "[t]he settlement was fairly and honestly negotiated at arms-length." A-30. However, this finding does not address the lack of bargaining leverage and could not, in any event, be effectively refuted without an opportunity to inquire into the conduct of the settlement negotiations. As indicated in their proffers, Objectors wanted to know what, if any, role the class representatives played in the settlement negotiations (R. 4222), whether class counsel defended or disparaged the value of the "no transportation" claim in the settlement negotiations (R. 4220, 4231), and whether counsel had sufficient information to properly analyze this claim since it had not been the subject of discovery in the Colorado case. (R. 4398).

(3) The settlement was a classic "reverse auction." (R. 4238). *See* John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1370 (1995). The reverse auction arises where there are overlapping class actions pending in different jurisdictions with separate counsel in each case involving the same or similar allegations. In such circumstances the defendant can settle with the attorney who will accept the lowest bid. *Id.* at 1371-72. That is exactly what happened here. defendant Shell had tried, but failed to settle the Texas class action at an earlier mediation. (R. 4389). *Cf. Prezant v. De Angelis*, 636 A.2d 915, 924 (Del. 1993) ("Indeed, the evil of inadequate representation is illustrated here, where

objectors had already rejected a settlement offer in the Illinois action similar to the one negotiated by De Angelis' counsel."). Defendants settled with Colorado counsel and obtained a release of the "no transportation" claim for little or no value, even though that claim was not included in the Colorado action and was valued by Objectors' expert at potentially over $200 million. (R. 2287). Cases involving similar circumstances have been considered to contain indicia of inadequate representation. *See Epstein v. MCA, Inc.*, 126 F.3d 1235, 1250-51 (9th Cir. 1997), *opinion withdrawn on other grounds and substituted*, 179 F.3d 641 (9th Cir. 1999); *Prezant*, 636 A.2d at 922.

(4) Objectors alleged that class counsel, Leo Crowley, had an undisclosed 50 percent ownership interest in one of the named plaintiffs (El Dorado) and that this interest disqualified counsel from representing the class because it violated Colorado Rule of Professional Conduct 1.8(j) which provides: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client. . . ." Moreover, Crowley's personal interest in a recovery by one of the named plaintiffs meant that Crowley was benefitting himself when he recommended that the named plaintiffs receive a 300% premium over other class members. The trial court acknowledged Crowley's interest, but found "that this has not undermined the zealousness of the representation here and does not constitute a disabling conflict of interest." A-28, n.5. The Tenth Circuit never specifically addressed this allegation. The issue here was not so much zealousness, but whether Mr. Crowley's personal interest in receiving approximately $650,000 in the settlement through a 50% interest in one of the named plaintiffs (R. 4221) influenced the decision to allocate a more than 300% premium to the named plaintiffs. (R.

4237-38). Objectors were denied the opportunity to interrogate Crowley about the negotiations which lead to this premium.

(5) Objectors alleged that plaintiffs' other counsel, John Cogswell, lobbied in favor of SB 141 in the Colorado legislature while this case was pending. (R. 4308, 4219). SB 141 was a special interest bill strongly backed by the major oil companies, including some of the defendants in this case, while vigorously opposed by royalty owners. If passed, it could have cut in half the royalties paid to royalty owners. (R. 4312). Although the bill died in the Colorado legislature following a public outcry, Objectors argued that Cogswell's support of the bill demonstrated his divided loyalties, lack of zealousness, and inadequacy as class counsel. (R. 4189, 4228). The trial court refused to permit inquiry into this claim and the Tenth Circuit ignored it in its opinion.

(6) Objectors alleged serious conflicts of interest among the three groups represented by plaintiffs' counsel. Plaintiffs' counsel admitted that conflicts existed among the three groups. (R. 2357). The Tenth Circuit justified this conflict by accepting the representation of the proponents of the settlement that each group was represented by a separate class representative. A-17. Such separate representation, however, was meaningless unless each representative of a group understood that it was his responsibility to represent solely the interests of his group during the settlement negotiations. *See Amchem*, 521 U.S. at 627; *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2nd Cir. 1992). Since the Court refused to allow inquiry into the settlement negotiations, it was never determined whether or not the class representatives lived up to their responsibilities. What

evidence there is indicates that the class representatives ceded settlement authority over the class actions to the Coalition. (R. 1020, 3597). This transfer effectively prevented the discharge of the responsibility that each class representative had to his separate group.

These claims constituted serious and specific allegations of conflicts of interest requiring factual inquiry and resolution. The district court, however, permitted no discovery, no live witnesses, no cross-examination and no rebuttal. A district court may "impose reasonable restrictions on the number [or order] of witnesses and on the substance of their testimony," *Jenkins v. McKeithen,* 395 U.S. at 429, but "a person's right to present his case should not be left to the unfettered discretion of the [district court]." *Id.* Yet that is precisely what happened here. Unless the writ is granted, unfettered discretion is likely to remain the due process standard by which class action settlement hearings are conducted.

## II. The Courts of Appeals Are Split on the Procedural Rights of Objectors at Class Action Settlement Hearings and on the Application of Heightened Scrutiny in Pre-Certification Settlements.

In *United States v. State of Oregon*, 913 F.2d 576, 582 (9th Cir. 1990), the Ninth Circuit acknowledged a split among the circuits on the type of hearing to be afforded objectors in the settlement of a class action. The court stated:

> [A]lthough some circuits have allowed cross-examination of witnesses at hearings on class action settlements, *see, e.g., Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833 (3rd Cir. 1973) (shareholder suit); *Girsh v. Jepson*, 521 F.2d 153,

> 157 (3rd Cir. 1975) (*citing Greenfield*); other courts have rejected this requirement. "The growing rule is that the trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). *See also Plummer*, 668 F.2d at 659 (court not expected to "convert settlement agreement hearings into trials on the merits"); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2nd Cir. 1974) (court "must stop short of the detailed and thorough investigation" of a trial). We think the latter is the better rule.

*Id.* at 582.

Although the Ninth Circuit correctly identified this split among the circuits, it failed to note that the Seventh Circuit also afforded objectors the right to cross-examine witnesses at class action settlement hearings, *see GM Engine Interchange Litig.*, 594 F.2d at 1123 and n.19 (7th Cir. 1979), while the Tenth Circuit does not. *See Jones*, 741 F.2d at 325. Moreover, there are internal splits within several circuits. For example, the law in the Fifth Circuit is far less clear than the Ninth Circuit suggested. While *Cotton v. Hinton*, 559 F.2d at 1331 (5th Cir. 1977) does say that the trial court "may limit its proceedings to whatever is necessary" to reach an informed decision, that case appears inconsistent with the Fifth Circuit's earlier decision in *Calhoun v. Cook*, 487 F.2d at 683 (5th Cir. 1973) ("[M]inimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views.") and with its later decision in *In re Corrugated Container Antitrust Litig.*, 752 F.2d at 143 (5th Cir. 1985) (contested issues of fact must be resolved in a "plenary" hearing). There is also a

lack of clarity in the position of the Second Circuit. *Compare Wolf v. Nazareth Enterprises, Inc.*, 303 F.2d at 154 (2nd Cir. 1962) (court would look with disfavor on any restriction on objectors' right to cross-examine witnesses) with *Plummer v. Chemical Bank*, 668 F.2d at 659 (2nd Cir. 1982) (court need only explore the facts sufficiently to make intelligent determinations concerning adequacy and fairness). Even the Sixth Circuit is inconsistent. *Compare Cohen v. Young*, 127 F.2d at 724 (6th Cir. 1942) (objector was entitled to cross-examine witnesses and introduce evidence) *with Tennessee Assoc. of HMO v. Grier*, 262 F.3d 559, 566-67 (6th Cir. 2001) (district court may limit hearing to whatever is necessary to make informed decision).

The Ninth Circuit saw these inconsistencies as reflecting an evolution toward a "better rule," but this so-called "better rule" is no rule at all. It is instead the "unfettered discretion" that this Court condemned in *Jenkins v. McKeithen*, 395 U.S. at 429. This Court should resolve this split among the circuits (and within the circuits) and provide guidance as to the type of hearing required in class action settlements in order to protect the due process rights of absent class members whose rights are increasingly threatened by pre-certification settlements, as shown by this Court's decisions in *Amchem* and *Ortiz*.

The standard for review of pre-certification settlements is also increasingly muddled among the circuits. At least three circuits have held that settlements negotiated at the pre-certification stage are subject to "heightened scrutiny." *See GM Engine Interchange Litig.*, 594 F.2d at 1125 (7th Cir. 1979); *GM Truck*, 55 F.3d at 805 (3rd Cir. 1995); *Malchman*, 706 F.2d at 434 (2nd Cir. 1983). This Court has also mentioned the need for "undiluted, even heightened, attention in the settlement context" when a

court is asked to certify a settlement class. *See Amchem*, 521 U.S. at 620. However, even though this case involved a pre-certification settlement, the Tenth Circuit made no mention of the need for "heightened scrutiny." Nor did the Tenth Circuit require heightened scrutiny based on the 300% premium for the named plaintiffs. To add to the confusion, the precise meaning of "heightened scrutiny" remains unclear.

This Court should grant the writ to make the application and meaning of "heightened scrutiny" uniform in pre-certification settlements.

## III. The Tenth Circuit's Opinion in This Case Conflicts with This Court's Decision in *Amchem*.

Objectors argued in the district court and again on appeal that the district court abused its discretion in certifying the settlement classes because there were antagonistic conflicts of interest among the three separate groups (the RIOs, the ORRIs and the SSWIOs), all of which were represented by the same counsel. The plaintiffs acknowledged this conflict (R. 2357), but argued (and the district court found) that it was cured by allowing the court to allocate the settlement proceeds among the three groups. A-42. The Tenth Circuit accepted this argument and, relying in part on *Amchem*, also noted that each group had its own class representative. A-16-17.

The Tenth Circuit's decision is in fact inconsistent with *Amchem*. In *Amchem*, this Court quoted *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2nd Cir. 1992), with approval for the proposition that "the adversity among groups requires that the members of each group cannot be bound to a settlement except by consents given by those who understand that *their role*

*is to represent solely the members of their respective groups.*" 521 U.S. at 627 (emphasis added). This Court then stated in affirming the Court of Appeals: "[T]he Third Circuit found no assurance here – either in the terms of the settlement or in the structure of the negotiations – that the named plaintiffs operated under a proper understanding of their representational responsibilities." *Id.*

The same is true in this case. Rather than arguing vigorously to maximize the settlement for their respective groups, the class action representatives each signed an Agency Agreement in which they granted the Coalition "full authority to settle all claims, subject only to the class representatives' right to file objections or suggestions" with the Coalition. (R. 1020, 3597). Thus, whatever separate role the three class representatives might otherwise have played on behalf of their individual groups was nullified by reuniting their respective authority in a single group that could not serve as a separate advocate for any one group. Furthermore, Albert Rutter, the lone class representative for the ORRIs, when questioned at his deposition (by defense counsel) as to how he could satisfy his fiduciary duty to the class, replied: "I don't know." (R. 4348-53).

It is no answer to say that the problem was solved by allowing the district court to allocate the settlement proceeds among the three groups. The district court did not actually "determine" the allocation among the groups, as the Tenth Circuit stated. A-16.

This characterization was factually inaccurate because the initial allocation was in fact made by plaintiffs' counsel representing all three groups and consisted of an allocation that valued the claims of the ORRIs and the RIOs equally with the SSWIOs, notwithstanding Objectors' contention that the ORRIs' and RIOs' claims were far

more valuable than the SSWIOs'. (R. 1643-44). The allocation was then modified at the request of the fairness expert by reallocating $1.2 million of the settlement proceeds ($1.19 million after adjustments) from the named plaintiffs to the absent class members. As so modified, the settlement was approved by the district court. A-37, 51.

Nothing in this process avoided the original conflict among the three groups because neither counsel nor the fairness expert could represent all the groups simultaneously and also "represent solely the members of their respective groups," as required by *Amchem*. The two roles are inconsistent with one another. The initial conflict of counsel was therefore not cured; it was simply transferred to the fairness expert and then enshrined in the settlement.

The claim that the district court "determined" the allocation is also legally unsound and conflicts with this Court's decision in *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). The district court did not have the authority to make a settlement for the parties or to determine any of its terms; it could only approve or disapprove a settlement that the parties made and submitted to the court. *Id.*; *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989). Accordingly, if there was a conflict among the various groups when counsel for the class made the initial allocation, that conflict remained even after the modification suggested by the fairness expert was adopted by the district court. Either way, the separate advocacy required by the court in *Amchem* was missing. This Court should grant the writ to resolve a conflict between this case and *Amchem* and to ensure that the separate advocacy requirement of *Amchem* is properly applied by the circuit courts.

## IV. The Tenth Circuit's Opinion in this Case Conflicts with This Court's Decision in *Ortiz*.

In *Ortiz*, this Court criticized the structural integrity of a settlement in which the same attorneys who represented clients in individual cases also negotiated settlements of class actions and settlement of the individual claims was made contingent by counsel for defendants on the settlement of the class actions. 527 U.S. at 852. The same problem existed here. The same counsel who negotiated settlement of the class actions also represented 76 individual claimants in the original Coalition case and settlement of that case was made contingent by counsel for defendants on the settlement of the class actions. (R. 2085). The Tenth Circuit ignored this problem even though it was raised below. (R. 1663-64) (App. Br. at 37). The writ should be granted to uphold *Ortiz*.

## V. The Tenth Circuit's Opinion Invites Abuse in Class Action Settlements by Sanctioning a Collusive Reverse Auction.

Objectors argued in the trial court and on appeal that this case involved a collusive "reverse auction" in which the defendants were able to exploit the existence of overlapping class actions with the same or similar allegations by settling with the attorneys who would accept the lowest settlement offer. (R. 1672) (App. Br. at 61). *See* Coffee, *supra*, at 1372; Puckett, *supra*, at 1297-98. That is what occurred here. Texas plaintiffs succeeded in obtaining class action certification of a nationwide class, while the Colorado plaintiffs failed twice. Defendant Shell tried, but failed to settle cheaply with the ORRIs and the RIOs at a mediation of the Texas case. Defendants then turned to the low bidder, Colorado counsel, and forged a nationwide class action settlement in which plaintiffs' counsel will

receive more than $18 million in attorneys' fees, the class representatives and named plaintiffs will receive a more than 300% premium, defendants will obtain complete releases, while the class members will receive mere pennies on the dollar for their claims. Objectors argued that this sequence of events was strong evidence of collusion. *See Prezant*, 636 A.2d at 924. ("When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee").

A similar sequence of events came before this Court in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In that case, Justices Ginsberg and Stevens in their dissent discussed *Prezant* and its conclusion that an inadequate class representative "'taint[s]' the entire settlement process." *Id.* at 397-98. In *Matsushita*, as in this case, the settling defendants were able to dispose of a class action pending in another court by incorporating claims into their settlement that were not contained in the pleadings of the case they settled. That tactic succeeded in *Matsushita* notwithstanding serious doubts about the adequacy of the class representative in the Delaware action because the Delaware Supreme Court upheld the settlement and this Court was bound to give full faith and credit to the Delaware court's judgment. *Id.*

Unlike *Matsushita*, the reverse auction issue in this case comes to this Court on direct review from a lower federal court decision that has found adequate representation notwithstanding the very same type of collusive settlement that was present in *Matsushita* and *Prezant*. Moreover, the need for corrective action is even greater in this case because the Tenth Circuit's decision mistakenly legitimized the reverse auction by rejecting Objectors'

challenge on the grounds that "no settlement could ever occur in the circumstances of parallel or multiple class actions . . . without (the competing cases) being accused by another of participating in a collusive reverse auction." A-19, 41-42. This is both untrue and unresponsive to the concern for collusive settlements expressed in *Prezant* and *Matsushita*.

The assertion that no case involving parallel class actions could ever settle if Objectors' argument was adopted is false because such actions could be settled without collusion if: (a) counsel in the competing cases were invited to join the negotiations and a joint settlement were reached; (b) only the claims pending in the case before the settling court were approved for settlement and the court expressly reserved the claims in the other case for trial, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982); or (c) the court concluded that the representation in the settling case was adequate after a full evidentiary hearing. None of these approaches was taken here.

There is, of course, a fourth possibility. If the district court had refused to certify the class or rejected the settlement, the case could have gone to trial or settled in Texas where a class action had been certified in two separate evidentiary hearings, each lasting four days. Indeed, Objectors had asked the district court to abstain in the Colorado action in favor of the Texas cases, but the district court refused, A-56, 58, notwithstanding that the district court was required under Rule 23(b)(3)(B) to consider the pendency of another class action before granting class action status in the Colorado case. *See Wolf Prado-Steiman v. Bush*, 221 F.3d 1266, 1282 (11th Cir. 2000) ("[T]he district court should be careful not to certify

subclasses overlapping with certified classes in other related . . . litigation. . . ."). *See also* Conte & Newberg, *Newberg on Class Actions* § 7.31, p. 94 (4th ed. 2002) ("rarely should the same class be certified on the same cause of action before more than one court . . . ").

This Court should grant the writ to prevent further abuse of the reverse auction device in class action settlements.

## CONCLUSION

For the reasons stated, Petitioners pray that this Court issue a writ of certiorari in this case to the Tenth Circuit.

Respectfully submitted,

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